

DEFEND THE BAY**NATURAL RESOURCES DEFENSE COUNCIL**

August 14, 2003

Mr. Gerard Thibeault
Executive Officer
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

*Re: NPDES permit for Orange County, Order No. 01-20
(NPDES No. CAS 618030), County's DAMP Section 7 and WQMP
County's Response to Comments, July 22, 2003*

Dear Mr. Thibeault:

Introduction

In its July 22, 2003 correspondence and in its revised DAMP and WQMP documents, the County of Orange has failed to meaningfully respond to the majority the Regional Board's written comments regarding the County's proposed new and redevelopment program. The County, moreover, has failed to revise DAMP Section 7 and the accompanying model WQMP to reflect these comments. In addition, having convened an imbalanced task force to advise it originally, the County now has failed to respond to written comments from environmental organizations regarding its approach to new and redevelopment projects. As a matter of public policy, this is not only unseemly, but it violates the Permit, which requires the County to involve the public in the review of program components under the Permit. Permit Section I, ¶ 10 (Responsibilities of Principal Permittee) (see below for additional discussion of public process issues).

We will not reiterate our June 30 comment letter or that of the same date by Dr. Richard Horner. Rather, this letter emphasizes some of the most important shortcomings of the revised DAMP Section 7 and the accompanying proposed model WQMP—including some new issues created by the proposed revisions.¹

As a whole, our view is that the County's DAMP Section 7 and proposed model WQMP introduce a series of unjustified exemptions and limitations to the new and redevelopment program that individually and additively frustrate both the letter and spirit of the Permit. These include:

¹ We are sending these comments to comply with staff's request for input by August 15, but we reserve the right to make additional comments after additional review of the proposed DAMP and model WQMP.

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- The near total failure to update the DAMP consistent with Permit Section XII.A, depriving the program of critical tools to reduce polluted runoff;
- The misapplication (or lack of application) of basic legal standards, specifically MEP, Receiving Water Compliance, BAT and BCT;
- Weakening of the stated purpose of the program to focus merely on "minimization" of impacts;
- The failure to update general plans or CEQA approaches (while inconstantly relying on these macro planning tools to guide the model WQMP process in significant ways);
- Creating two project categories—priority and non-priority—that exclude through narrow definitional scopes many and perhaps most projects within the County;
- Predicating treatment BMP approaches in important part on non-existent and non-approved regional facilities;
- Focusing on 303(d) listed pollutants and individually significant hydrological changes while ignoring or downplaying incremental, cumulative impacts;
- Limiting the scope of redevelopment-related WQMPs by fashioning limits not found in the Permit;
- Excluding mandatory use of site design BMPs from most projects;
- Failing to mandate "in-lieu of" requirements when and if waivers of structural treatment BMPs are issued;
- Excising guidelines associated with the conservation of natural areas and maximization of non-pervious areas.

Notably, in many cases, these attributes reflect an uncanny similarity to the litigation positions of opponents of new and redevelopment pollution controls, including the BIA, which participated on the County's model WQMP task force.

For example, the BIA argued in unsuccessfully challenging the San Diego County Municipal Storm Water Permit that treatment control BMPs were unlawful; that the Regional Board did not have authority to cause cities to revise general plans or CEQA review processes, that the Regional Board had no authority to regulate hydrological changes; and that the Regional Board could not require compliance with water quality standards.

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While the model WQMP is not as doctrinaire with respect to these issues, it is nevertheless consistent in key ways. For example, the DAMP and model WQMP downplay the need to make any major changes to General Plans notwithstanding the requirements of Section XII.A of the Permit (proposed DAMP at 7-12). Moreover, even after the Regional Board commented strongly against this inclination, the DAMP retains a prejudice against any changes unless a city is expecting "major" growth. *Id.* Similarly, the DAMP concludes that existing CEQA review processes that focus on individually significant changes caused by a project are adequate, even though the Regional Board commented otherwise. *Id.* at 7-20.

In these and other ways, the proposed DAMP and model WQMP seek in many respects to achieve functionally what the BIA sought and failed to achieve as a matter of law.

Additional Comments

1. **The County has developed DAMP Section 7 and the proposed model WQMP without obtaining balanced public input, in violation of the Permit and the Clean Water Act.**

Our June 30 comments discuss this issue. However, the County has compounded the problem by failing to respond to comments submitted by NRDC, Defend the Bay and Dr. Horner (and perhaps others, as well). Before the County's proposals can be lawfully approved, a meaningful consideration of and response to comments by the Regional Board is mandatory under the Permit and more broadly under the Clean Water Act's public participation requirements. *See* 40 C.F.R. Part 25.8.

This is especially true because the review and approval of the County's submittals are core permitting-related activities. The Regional Board chose to bifurcate the permitting process by allowing the County to formulate its preferred new and redevelopment program after permit issuance in 2001. However, by doing so, the Regional Board deprived the interested public in 2001 of a chance to comment upon and receive responses concerning the substance of a program that is a required component of municipal storm water programs and which would otherwise have been required to be in the Permit from the date of its issuance. Since responses to comments made on the DAMP and model WQMP in 2001 would have been required, they must be made now. Indeed, the recent Ninth Circuit decision regarding EPA's MS4 Phase II rules emphasized the need for strong public participation requirements in connection with discharger submittals of programmatic materials. *Environmental Defense Center, NRDC v. U.S. EPA*, 319 F.3d 398 (9th Cir. 2003).

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Even such a response to comments will not cure the County's violation because it "stacked the deck" by depriving the public broadly of the right to help formulate DAMP Section 7 and the model WQMP, which makes it much harder to meaningfully change now. Even if *one* representative of the environmental community did participate, as argued by the County, this hardly means that the task force was balanced given its *fourteen* (or more) industry representatives.

Notably, EPA regulations contain detailed requirements for Advisory Groups similar to the one convened by the County. 40 C.F.R. Part 25.7. These regulations emphasize the importance of "substantially equivalent" balance in membership and require "positive action" by the organizing entity to achieve this balance. *Id.* The County has totally failed to do so.

The Regional Board must: respond to comments submitted by the public; direct the County to withdraw its programmatic submittals pending additional meetings of a reformulated advisory group; issue a Notice of Violation to the County for violating the Permit and the Clean Water Act.

2. **The County has not created a framework whereby consideration of cumulative impacts guides the review and approval of project-specific WQMPs; similarly, the County has set too high of a standard of "significance," focusing on project-related changes that will cause impairment or hydrologic impact by themselves.**

The County has agreed that it and the permittees must consider cumulative impacts of development and other activities as well as impacts to downstream receiving waters. July 22 Response to Comments at 2.

However, it has failed to revise the DAMP and accompanying proposed WQMP to implement these important requirements. The County states that the permittees may—over time—develop tools by which cumulative assessments can be made. However, the Permit requires that the program be in place now—not by some unspecified time in the future. Moreover, as the Regional Board notes in its own comments, so far CEQA analyses are not sufficiently detailed to accomplish the requirements of the Permit. Indeed, since the County concludes in the DAMP that existing CEQA review is largely sufficient, there is no reasonable prospect that the DAMP and WQMP (or other aspects of the Permit program) will provide any real capability to make these important assessments.

Moreover, the County has not revised the DAMP or WQMP to remove the bias toward requiring treatment only of impairing pollutants or those that by themselves create "significant" impacts (as in the case of hydrologic impacts). For example, Page 7-II-13 continues to state that hydrologic

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changes are of concern when the change *by itself* would have a "significant" impact downstream. This is precisely the problem in emphasis and design on which the Regional Board commented. But the County in the revised documents has not fixed the issue.

The County therefore should be instructed to propose a detailed method for assessing specific projects in light of cumulative and downstream impacts, or it must require project proponents to do so. This must be done now not at an unspecified time in the future.

3. **The County has weakened and confused the DAMP's purpose by striking "maximum extent practicable" in each place in which it was previously inserted and by dramatically altering the Model WQMP's stated purpose.**

While the MEP standard is not, by itself, a sufficient or lawful description of the legal requirements imposed by the Permit (see our June 30 letter at 1-2), striking references to it leaves the goal of the program vague and nonspecific from the perspective of the permittees. The legal standard includes, among other things, meeting water quality standards. The County seems to be avoiding this reality, and it is setting itself and the permittees up for non-compliance as a result.

Moreover, in the introduction to DAMP Section 7, the County has drastically weakened the stated purpose of the Model WQMP. This revision is inconsistent with the Permit, which requires compliance with MEP and receiving water limits.

The County should be instructed to revise the DAMP and Model WQMP to clearly state that its purpose is to comply with the MEP and receiving water compliance standards. It should reinstate the general purpose statement contained in the previous iteration of the Introduction.

4. **The County is not proposing to identify and require treatment control BMPs that are effective in reducing all pollutants of concern.**

The County's response on this issue may obfuscate its apparent conclusion: that permittees may primarily consider 303(d) listed pollutants and design treatment control BMPs to focus on these pollutants. The County's change in nomenclature from "secondary" pollutants to "other" pollutants is not a substantive change. Nowhere does the County clearly indicate that it will in fact assure that all pollutants of concern are adequately treated and that treatment BMPs will be designed to accomplish this task. Thus, the County has deflected the Regional

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Board's comment, which instructed the County that this is the goal of treatment BMP design and implementation.

The County should be instructed to make revisions that specifically track the Regional Board's comments and mandate that all pollutants of concern be addressed in the context of treatment control BMP identification and implementation.

5. **The County acknowledges that on-site treatment may not be waived in favor of regional approaches unless the regional approaches account for all pollutants of concern, but it fails to clearly revise the DAMP and WQMP to reflect this fact.**

Revise the DAMP and WQMP accordingly.

6. **The County confuses the MEP-BAT-BCT issue.**

The County's program must comply with the MEP standard, among other requirements. However, in order to do so, the County and the permittees must assure that pollutants in post-development runoff are reduced using BAT and BCT. Permit at § XII.B. There is no need to remove references to these standards. Instead, proper references are necessary to clarify obligations and to assure permittees do not violate the Permit due to the County's lack of accuracy.

Reinstate references to MEP, receiving water standards compliance, and BAT/BCT, as discussed above.

7. **The County has not required all projects within its jurisdiction to implement site-related BMPs if subject to the model WQMP provisions nor has the County more generally assured that all projects will be subject to the Section 7/model WQMP provisions as an initial matter.**

The DAMP and WQMP still exempt many projects entirely from the purview of these sections, as described in our previous comment letter. Basically, the DAMP defines a large number of projects out of the DAMP/model WQMP ambit through the priority/non-priority definitions. Even within the non-priority segment, there is no requirement for these projects to install site design BMPs. There is no justification for either limitation, and the former is especially troubling and inconsistent with the requirements of the Permit.

Both of these exemptions must be excised from a revised DAMP/Model WQMP.

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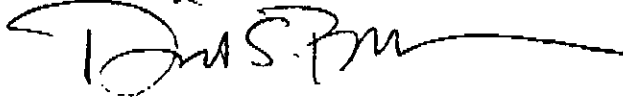
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8. The County has failed to make the following modifications, as set forth in our June 30 comment letter:

- Comply with Permit requirements to include the entire site in the WQMP when more than 5,000 square feet of redevelopment will occur;
- Augment project review requirements as opposed to relying on standard CEQA guidelines;
- Excise references to regional storm water facilities until and unless any are approved;
- Create offset requirements when treatment waivers are issued;
- Address Permit Section XII.A. in the DAMP; and
- The County has ignored the vast majority of Dr. Horner's comments, as set forth in his June 30, 2003 letter.

In conclusion, we believe that this process has been unbalanced and, as a result, the County's proposal is fundamentally inadequate. Not only are many substantive changes required, but the Regional Board has a strong interest in assuring that the County does not again so manifestly "stack the deck" by involving disproportionately special interests with financial interests in the outcome of the County's DAMP revision process. This process makes a mockery of the Regional Board's decision to defer consideration of many substantive elements of the Permit to dates well after Permit issuance.

Sincerely,



David S. Beckman
Senior Attorney
Natural Resources Defense Council

cc: Mr. Robert Caustin
Craig M. Wilson, Chief Counsel, SWRCB